Supreme Court of the United States

No. ——, Original, October Term, 1941

EX PARTE THE STATE OF TEXAS, ET AL.,
PETITIONERS

SUPPLEMENTAL ARGUMENT FOR THE INTERVENER
LONE STAR GAS COMPANY

INDEX

AUTHORITIES

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MAY IT PLEASE THE COURT:

This Supplemental Argument is filed by the intervener Lone Star Gas Company by way of reply to "Petitioners' Reply to Respondents' Return and to Opposition of Lone Star Gas Company" and for the purpose of directing attention to certain authorities not referred to in its brief previously filed.

I.

The Court is without jurisdiction to issue the writ applied for.

(1) The petitioners strongly rely upon *Graham v. Norton*, 15 Wall. 427, 428. That case merely follows and applies the decision made in *Riggs v. Johnson County*, 6 Wall. 166, 193, 198.

The intervener has pointed out in its brief that writ of mandamus as used in *Graham v. Norton, supra*, and in *Riggs v. Johnson County, supra*, was in effect a writ of execution issued to enforce a judgment previously rendered, in the manner authorized by the State law—issued as an execution process under Section 25 of the Judiciary Act of 1789, now Section 237 of the Judicial Code, and under the Process Acts (1 Stat. at L. 276; 4 Stat. at L. 274; 6 Wall. 190-192.) The writ of mandamus "was the process resorted to by the plaintiff to procure satisfaction of his judgment." *Amy v. The Supervisors*, 11 Wall. 136, 137.

The following is quoted from the majority opinion in *Riggs v. Johnson County, supra:*

"Circuit courts, by virtue of those acts of Congress, became armed with the same forms of writs and executions, and vested with the authority to employ the same modes of process, as those in use in the State courts. Permanent effect of that wise measure was, that the forms of writs and executions and the modes of process were the same, whether the litigation was in the forums of the State or in the Circuit Court of the United States.

" * * * * * *

"Established rule in the Supreme Court of the State is, that where the debt of a municipal corporation has been reduced to judgment and the judgment creditor has no other means to enforce the payment, mandamus will be issued to compel the proper officers of the municipality to levy and collect a tax for that purpose." (6 Wall. 192, 193.)

The Court pointed out that the writ of mandamus when so employed is "neither a prerogative writ nor a new suit, in the jurisdictional sense," but,

"On the contrary, it is a proceeding ancillary to the judgment which gives the jurisdiction, and when issued, becomes a substitute for the ordinary process of execution to enforce the payment of the same, as provided in the contract." (6 Wall. 198.)

The holding of the majority was thus interpreted and combatted by Mr. Justice Miller in his vigorous dissent, 6 Wall. 205-209.

Riggs v. Johnson County, *supra*, and similar cases have been so interpreted in later decisions of this Court. In *Rosenbaum v. Bauer*, 120 U. S. 450, 454, the Court held that a Circuit Court of the United States has no jurisdiction of an original action to obtain a mandamus against a board of supervisors of a city to compel a tax levy. Referring to *Riggs v. Johnson County*, and similar cases, the Court said:

"Consistently with the views in those cases, this court, in *Riggs v. Johnson County*, in 1867, 6 Wall. 166, held that a Circuit Court had power to issue a *mandamus* to officers of a county, commanding them to levy a tax to pay a judgment rendered in that

court against the county for interest on bonds issued by the county, where a statute of the State, under which the bonds were issued, had made such levy obligatory on the county. This ruling has been repeatedly followed since, and rests on the view that the issue of the *mandamus* is an award of execution on the judgment, and is a proceeding necessary to complete the jurisdiction exercised by rendering the judgment." (Per Mr. Justice Blatchford.)

In *Memphis v. Brown*, 97 U. S. 300, 302, the Court said:

"A *mandamus* to collect a tax for the payment of a judgment or a *mandamus* to pay a judgment, is process in execution, and nobody heretofore has ever questioned the power of a court to control its own final process."

The holding in *Riggs v. Johnson County*, was so viewed by the Supreme Court of Iowa in *Ex parte Holman*, 28 Iowa 88, 104. That Court, in an opinion written by Judge Dillon, then its Chief Justice, after quoting what we have quoted above from the majority opinion in *Riggs v. Johnson County*, added the following:

"To the same effect, treating the mandamus as process subsequent to judgment, see also *United States, etc., v. Council of Keokuk*, 6 Wall. 514, 518, 520; *Weber v. Lee County*, id. 210.

" * * * * * *

"When the United States court treat the mandamus as mere process—a substitute in this class of cases for the ordinary execution—can any other court decide that they are mistaken, and thereon

base a right to interfere with the execution of the writ? Clearly not." (28 Iowa 104.)

Charles Warren, in his article on "*Federal and State Court Interference*," 43 Harvard Law Review, pages 345, 352, after referring to *Riggs v. Johnson County*, and the cases following it, including *Graham v. Norton, supra*, says:

"The federal courts issued these writs of mandamus only as a process for the execution of their judgments, and only when a state statute authorized the issuance of such a writ by the state court."

(2) In support of their claim that the Court has jurisdiction to issue the writ, petitioners emphasize the fact that they have no other remedy by appeal or certiorari, the judgment not being a "final judgment" within the meaning of Section 237 of the Judicial Code. They distinguish *In re Blake*, 175 U. S. 114, and other cases, upon that ground. (Petition, p. 21.) The rule that mandamus may issue where there is no plainer remedy and that the writ may not issue where a remedy by appeal is available is not a rule of jurisdiction. It is one that goes to the propriety of issuing the writ in a particular case, the jurisdiction of the Court under the Constitution and laws being already established. Hence, where the question raised is one of jurisdiction to issue the writ, the absence of a remedy by some method of appeal is not material. *Ex parte Newman*, 14 Wall. 152, 168; *In re Burdett*, 127 U. S. 771; *Ex parte Park & Tilford, Petitioners*, 245 U. S. 82, 86; *In re Pennsylvania Company*, 137 U. S. 451, 454;

Kloeb vv. Armour & Co., 311 U. S. 199; *Interstate Commerce Commission v. United States*, 289 U. S. 385, 394.

Under the rule laid down in these cases the absence of a remedy by appeal or certiorari cannot serve the purpose of enlarging the jurisdiction of this Court on appeal. The "final judgment" rule—a criterion of jurisdiction since 1789—cannot be circumvented by resort to the writ of mandamus.

Petitioners cite *Livingston v. Dorgenois*, 7 Cranch 577, *Ex parte Bradstreet*, 7 Peters 634, *Ex parte Roberts*, 15 Wall. 384, and other similar cases. These cases are clearly inapplicable. Viewed generally, they rest upon the fact that the Constitution and laws have committed to this Court the general superintendence of the courts constituting the Federal system. *Ex parte Crane*, 5 Peters 190, 192-194; *Ex parte United States*, 287 U. S. 241, 245, 248; *Ex parte Abdu*, 247 U. S. 27. The State courts are not a part of the Federal system; they are not inferior courts, in a legal sense, when considered in their relation to this Court. Instead, they are separate and independent courts. "Tribunals of the State and the Union are independent of one another." *Taylor v. Carryl*, 20 Howard 597. Congress has committed to this Court only the power, carefully defined and expressly limited, to review certain judgments of the State courts in specified cases—final judgments. The power of general superintendence has not been conferred. Therefore, it seems clear that the general language used in Section 14 of the Judiciary Act of 1789, Section 262 of the Judicial Code, cannot be

given the same construction in its application to the highest courts of the several States as in its application to the inferior courts of the Federal system. It is obvious that a stricter rule of construction must be applied and that the cases involving the issuance of the writ to the lower Federal courts are not applicable. For this reason, cases like *In re Chetwood*, 165 U. S. 443, and *In re 620 Church Street Building Corporation*, 299 U. S. 24, are clearly inapplicable. To apply the ruling announced in these cases in issuing the compulsory writ of mandamus to the State courts would be in essential conflict with the principles and considerations underlying *Toucey v. New York Life Insurance Company* and *Southern Railway Company v. Painter*, decided November 17, 1941.

In *Taylor v. Carryl*, 20 Howard 583, 597, the Court, in an opinion by Mr. Justice Campbell, said:

"The legislation of Congress, in organizing the judicial powers of the United States, exhibits much circumspection in avoiding occasions for placing the tribunals of the States and of the Union in any collision. A limited number of cases exist, in which a party sued in a State court may obtain the transfer of the cause to a court of the United States, by an application to the State court in which it was commenced; and this court, in a few well-defined cases, by the twenty-fifth section of the judiciary act of 1789, may revise the judgment of the tribunal of last resort of a State. In all other respects the tribunals of the State and the Union are independent of one another."

Petitioners cite *Stanley v. Schwalby*, 162 U. S. 255. (Petitioners' Reply, p. 2.) The case was not a mandamus case. The Court acquired jurisdiction by a second writ of error. The case does not hold that a writ of mandamus may be used for the purpose of subjecting the judgment of the State court to review and reversal for alleged error, as here attempted. Petitioners also cite *State Tax Commission v. Van Cott*, 306 U. S. 511. (Petitioners' Reply, p. 3.) In that case the jurisdiction of this Court attached in the usual way. The case involved no question of jurisdiction; it involved only the manner in which the Court should exercise its discretion in making disposition on appeal of a case of which it had undoubted jurisdiction.

II.

The writ prayed for should be denied because it is one to compel the Supreme Court of Texas to reverse its decision on the merits, already made, and to render another decision in a given way.

Where a case has already been decided on the merits, a mandamus to compel the Court to vacate the decision and then to proceed anew with the case to arrive at another decision is, in effect, to compel the court to which the writ is directed to decide the case in a particular way. On this point this Court in *In re Morrison, Petitioner*, 147 U. S. 14, 26, said:

"The District Court in New York having dismissed the libel out of court, on a hearing of the case on the merits, we are now asked to direct it to vacate

its order of dismissal, and to reinstate the cause, and to proceed upon the libel. This is in effect asking us to direct the District Court to decide in a particular way the matter heard before it, which is never the office of a mandamus. *Ex parte Morgan*, 114 U. S. 174; *Ex parte Brown*, 116 U. S. 401."

In *Ex parte Flippin*, 94 U. S. 348, 350, where a writ of mandamus was sought to compel the reversal of a decision already made, the Court said:

"Of this decision the petitioners complain, and seek to have it reversed. This we cannot do by *mandamus*. Under that form of proceeding we may compel an inferior court to decide upon a matter within its jurisdiction and pending before it for judicial determination, but we cannot control its decision. Neither can we in that way compel the inferior court to reverse a decision which it has made in the exercise of its legitimate jurisdiction. That is the office of a writ of error or an appeal, in cases to which such proceeding applies, but not of a writ of *mandamus*. If there is anything in the case of *McCargo v. Chapman*, 20 How. 555, to the contrary of this, it is disapproved."

From *In re Burdett*, 127 U. S. 771, 773, we quote the following:

"A petition on the part of H. S. Burdett and others, asking for a mandamus against the Judge of the Circuit Court of the United States for the Eastern District of Michigan, has been presented to us. The case arises out of an action of replevin in which the Circuit Court decided that it had no jurisdiction. A proceeding was then had to get damages for the

taking of the goods in replevin, which the court entertained and rendered judgment for the damages. The amount in controversy is too small to come to this court by writ of error, and we are asked by the writ of mandamus to direct the judge of that court to set aside the judgment which he rendered. Whether there was error in that matter or not, we do not think that we have any power by writ of mandamus to compel the judge of that court to reverse his own judgment."

In *Ex parte Newman*, 14 Wall. 152, 169, the Court said:

"Power is given to this court by the Judiciary Act, under a writ of error, or appeal, to affirm or reverse the judgment or decree of the Circuit Court, and in certain cases to render such judgment or decree as the Circuit Court should have rendered or passed, but no such power is given under a writ of mandamus, nor is it competent for the superior tribunal, under such a writ, to re-examine the judgment or decree of the subordinate court."

A writ, whatever it may be called, that requires a court to vacate a judgment already rendered disposing of the case on the merits involves an exercise of appellate jurisdiction. To use the writ in that way is to make it serve the office of a writ of error, appeal or certiorari. *In re Morrison, supra; American Construction Company v. Jacksonville Railway Company*, 148 U. S. 372 ,379. *Livingston v. Dorgenois* and the other cases cited by petitioner (Petition, p. 25) are not in point because in each of these the court to which the writ was directed, for one reason or another, had refused to dispose of the

case or the particular matter to be determined. Here, the case has already been decided on the merits by the State Supreme Court. In these circumstances, a writ issued out of this Court to compel the State court to reverse that decision is a writ to compel the court to decide the case in a particular way and, in essence, is an exercise of appellate jurisdiction in a case where that jurisdiction has been expressly withheld by the Act of Congress. Before granting the writ, this Court would have to make the same determination that is made in deciding whether to reverse a judgment brought under review by appeal or certiorari.

III.

The judgment of the State Court rests upon a non-federal ground adequate to support it.

(1) In discussing this question petitioners contend that the State Supreme Court, in construing the opinion of this Court, held that the effect of that opinion was to deny to the Court of Civil Appeals the right, granted to it under the State practice, to determine the factual insufficiency of the evidence to show that the rate was confiscatory.

The contentions pressed in this connection rest upon a misconception of the settled rule of decision in the State courts, concerning the authority of the Supreme Court and the Court of Civil Appeals, respectively, over findings of fact made in the District Court. If the Court of Civil Appeals had ruled merely that the evidence was factually insufficient

to support the verdict and had *remanded* the case on that ground, the State Supreme Court would have had no jurisdiction. (Return of the Justices, p. 11; Intervener's Brief, pp. 39-41.) But the Court of Civil Appeals went farther and held that the evidence was insufficient in law to even raise an issue of fact to be submitted to the triers of the facts as to whether the rate order was confiscatory; and, further, that there can arise no issue of fact in a rate case. So viewing the case, the Court of Civil Appeals reversed the judgment and findings of the court below and *rendered* judgment sustaining the rate order. The State Supreme Court did not invade, either rightfully or wrongfully, the power of the Court of Civil Appeals over the facts of the case. The Court of Civil Appeals did not exercise that power when it came to render judgment. It made a ruling on a question of *law* and not of *fact*.

When the case was remanded by this Court to the Court of Civil Appeals for further proceedings not inconsistent with the opinion of this Court, the Court of Civil Appeals did not attempt to exercise its fact finding powers. It examined the evidence only to find and declare that it was conflicting, and, then, without attempting to make findings of fact resolving the conflict, it declared that this was unnecessary. It held as a matter of law that the mere presence of the conflict required that the rate order be sustained without any attempt to settle the conflict. This was the ruling that was carried into effect by its judgment—a judgment of *rendition* and not of *remand*, the latter being the judgment that it is required to enter where it holds that the evidence is

factually insufficient. (Return of the Justices, p. 11; Intervener's Brief, pp. 39-41.)

The ruling that the evidence was insufficient as a matter of law to take the issue of confiscation to the jury was the only ruling falling within the jurisdiction of the State Supreme Court, and it is the only ruling in respect to the evidence that it attempted to review. Repeatedly in its opinion it referred to the ruling of the Court of Civil Appeals as being one that the evidence was insufficient as a matter of law to require the submission of any issue to a jury. (Petition, pp. 510-515.) Nowhere in its opinion does it even refer to the general ruling made by the Court of Civil Appeals near the conclusion of its opinion that the validity of the rate order was established "factually from so overwhelming a weight and preponderance of the evidence as to require a reversal in the interest of justice." (Petition, p. 116.) The intervener did not complain of that ruling in the State Supreme Court because it was a ruling that Court had no power to review and, further, because the Court of Civil Appeals had not based its judgment on that ruling. It complained of the ruling that the evidence was insufficient in law to warrant any fact finding by a jury as an error of State law—an error in construing and applying the applicable State statute. (Its Application for Writ of Error, pp. 274-275.)

The scope and force of the ruling made by the State Supreme Court on the question of State law must be considered and determined in the light of the second opinion of the Court of Civil Appeals. The Court of Civil Appeals ruled that, under the

statute, conflicting evidence in a rate case did not raise a material issue of fact to be determined by the trier of the facts. It was this ruling that the Supreme Court of Texas considered in great detail. When the State Supreme Court ruled that under Article 6059 conflicting evidence does raise a material issue of fact and that such an issue of fact is determinable by a jury as in "other civil causes in said court" (Article 6059), it thereby made a ruling which, standing alone, and of necessity, required a reversal of the judgment of the Court of Civil Appeals.

It is submitted that, if the State Supreme Court erred in failing to properly recognize the power of the Court of Civil Appeals in dealing with the finding of fact made by the jury, then the State Supreme Court erred in a matter of State law with which this Court is not concerned.

(2) The petitioners cite *State Tax Commission v. Van Cott*, 306 U. S. 511, in which the Court held that, where the State court's judgment rests upon two grounds and "these two grounds are so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of the State law," it would vacate the judgment of the State court and remand the case for further proceedings. In the case referred to, this Court was exercising appellate jurisdiction of the case in the usual way, by certiorari. The decision was later followed in *Minnesota v. National Tea Co.*, 309 U. S. 551, in which the Court held that where the grounds of a State court decision, holding a State statute to be uncon-

stitutional, were obscure, and the jurisdiction of this Court being therefore *in doubt*, the judgment would be vacated and the cause remanded for further proceedings so that the State and Federal questions might be clearly separated.

It is plain that these decisions afford no support for the position here taken that the compulsory writ of mandamus should be used to compel the State court to vacate its judgment—a judgment that is not subject to appellate review at all in this Court. Doubts as to the scope and meaning of the State court decision are not sufficient to support this application of the extraordinary writ of mandamus; doubt can never furnish the foundation for the lawful issuance of that writ. We think that the State court's decision was based upon a non-federal ground; but if there were doubt as to the scope and meaning of the decision, that doubt should mean a denial of the petition for mandamus. An inquiry as to what the Court in the exercise of its discretion might do with the case if it were before it on appeal or certiorari is beside the question.

IV.

Other Questions

(1) The construction applied by the Supreme Court of Texas to the opinion of this Court is clearly correct. (Opposition Brief, p. 30.)

This Court in the concluding paragraph of its opinion held that "the determination of the court of first instance as the trier of the facts that the Commission's rate was confiscatory could not properly

be set aside by the application of an untenable standard of proof and in disregard of the evidence which had been appropriately addressed to the Commission's findings and had been properly submitted to the jury." (304 U. S. 242.)

This ruling necessarily implies for its essential basis the holding that the evidence was conflicting and was therefore sufficient in law to require the submission of the issue arising on this conflicting evidence to the "trier of the facts." Otherwise, any error that the Court of Civil Appeals may have made in setting aside the finding of the "trier of the facts" was an immaterial and harmless error. The State Supreme Court, having final authority to declare the State law, has now declared, as it had previously declared for nearly fifty years, that conflicting issues of fact in such a case must be submitted to a jury, where a jury is demanded, as in, using the language of the applicable statute, "other civil causes in said court." (Art. 6059.)

(2) The proceedings taken in the Supreme Court were not "inconsistent with the opinion of this Court." (Opposition Brief, pp. 31-35.) The contentions made on the other side rest upon the assumption that the mandate secured to the petitioners the affirmative right to have the Court of Civil Appeals hold that the evidence was insufficient in law to warrant the submission of the issue of confiscation to the jury and insufficient in law to support its finding on that issue. No such right was secured to them by the Court's opinion and mandate.

It is clear that the State Supreme Court correctly construed the opinion of this Court, but if a

misconstruction be assumed, that could not, standing alone, violate the mandate. The misconstruction must be followed by a judgment or by "proceedings" inconsistent with the opinion of this Court, and no such judgment was rendered or "proceedings" taken. Conflict cannot be found in the *reasoning* employed by the State Supreme Court in support of a given *ruling* made by it unless it can be demonstrated that the ruling was in conflict with the opinion of this Court. The State Supreme Court ruled that the evidence was sufficient in law to raise the issue of confiscation and that the issue was correctly submitted to a jury and that their finding was sustained by sufficient evidence. In this ruling nothing can be found "inconsistent with the opinion of this Court." What reasoning the Court employed in support of that ruling is immaterial. This Court does not sit to review the reasoning of State courts, as distinguished from their rulings, any more in a mandamus case than where their judgments are brought before it by appeal or certiorari.

The other questions presented in Petitioners' Reply are sufficiently covered in Intervener's Opposition Brief heretofore filed.

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